No. 21983

In the

United States Court of Appeal

For the Ninth Circuit

EVERT L. HAGAN,
Appellant,

vs.

THE STATE OF CALIFORNIA, et al.,
Appellees.

APPELLANT'S OPENING BRIEF

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STATEMENT OF FACTS OF THE CASE

A notice of motion to file a cross-complaint was noticed for hearing before Judge William Levit; on arrival for the hearing, Judge Levit stated that the matter was being referred to Commissioner Harold V. Boisvert. Appellant immediately stated that Commissioner Boisvert was not acceptable (a motion for disqualification under Section 170.6, California Code of Civil Procedure, against Commissioner Boisvert); whereupon Judge Levit stated he felt that a prior stipulation for Commissioner Boisvert to hear as a Judge Pro Tempore the Pre-Trial Conference would carry over for this motion.

This is error in that upon the statement of disqualification under Section 170.6, the Judge must hear the matter of disqualification at once.

Upon arrival before Commissioner Boisvert, appellant found that there was a reporter present to report the proceedings, in violation of Rule 211(b), California Rules of Superior Court. Immediately, before appellant or his counsel could utter a word, Commissioner Boisvert demanded to know if appellant was wearing a recorder; when told yes, Commissioner Boisvert held appellant in contempt of court, and ordered the bailiffs to arrest him and search him at once.

This was error, in that:

1. Commissioner Boisvert had not been stipulated to by appellant for the hearing of a contempt, but only for the Pre-Trial, a separate and distinct matter.

2. Commissioner Boisvert required of appellant that he make a self-incriminating statement in order to prove the charge of contempt, thus violating due process.

3. Commissioner Boisvert did not have authority to order the arrest of appellant; it was later held that there was no contempt involved by the California Ditsrict Court of Appeal.

Thereafter, Commissioner Boisvert turned to appellant's counsel and asked question and found appellant's counsel in contempt, and ordered his arrest and search; this is not a matter herein involved.

Thereafter, in due course, this action for damages for violation of the Civil Rights of appellant was brought, and a motion to dismiss was granted by Judge Ferguson on the grounds that Commissioner Boisvert was acting as a Judge Pro Tempore throughout the proceedings and the doctrine of judicial immunity applied.

JURISDICTION

This action arose out of a violation of Civil Rights as defined in 42 U.S.C. Section 1983, and 1985, as set forth in the complaint and the Trial Court had jurisdiction to hear and determine the matter.

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. Section 1343 and 42 U.S.C. Section 1983.

QUESTIONS RAISED

1. Did Judge Ferguson commit error in holding that Commissioner Boisvert had jurisdiction as to all matters before him, including the charge of contempt?

2. In the absence of any jurisdiction to hear the charge of contempt, did Judge Ferguson commit error in holding that judicial immunity protected Commissioner Boisvert from a Civil Rights action?

I

In the judgment herein, Judge Ferguson notes on page 2, at line 31, that Judge Levit transferred the hearing of the motion to file a cross-complaint to Commissioner Boisvert, over the objections of Mr. Hagan, appellant herein. (Lines 1 to 3, of page 3, read as follows:

> "Judge Levit found that the motion appeared to be a renewal of the same motion previously heard and ruled upon by Commissioner Boisvert, and thereupon overruled the objection. * * * "

Judge Levit heard counsel for Mr. Hagan voice an objection to Commissioner Boisvert, under Section 170.6, California Code of Civil Procedure, and stated that this objection could be raised before Commissioner Boisvert and further stated that he thought the stipulation was still in effect.

California Law is otherwise. The law is well settled in California and recently stated in *Swartzman v. Superior Court,* 231 Cal. App. 2d 195, at page 200, where it is said:

> "A challenge under Section 170.6, CCP, is not timely when made after a Judge has heard and ruled on contested issues of law or fact in an action or proceeding. (*McClenny v. Superior Court,* 60 Cal. 2d 677; *Jacobs v. Superior Court,* 53 Cal. 2d 187."

Every California case on the question of whether or not a motion was made under said Section 170.6, is timely has in it the qualifications, that a motion is not made timely when it is made after a Judge determines an issue of law or fact.

In the instant case, Commissioner Boisvert had heard neither. He could not, and had he done so, he would have been without jurisdiction because he was assigned to hear Pre-Trial matters, which do not determine any of the merits of the case, but, merely by agreement, crystalize the issues, learn admitted facts, and separate the contentions remaining for trial.

Therefore, as a matter of practicality, common usage and habit, Commissioner Boisvert could not have heard any issue of law or fact, and the motion to disqualify him, made under Section 170.6, was therefore timely.

Judge Levit, therefore, acted completely without jurisdiction in denying appellants his right to urge the disqualification of Commissioner Boisvert.

This is a fact which has been made clear repeatedly through all briefs in this action and is in and of itself a denial of due process and unequal protection of the law.

II

COMMISSIONER BOISVERT ACTED THROUGHOUT IN EXCESS OF JURISDICTION IN FINDING APPELLANT IN CONTEMPT OF COURT.

Aside from any other fact, and assuming only for the point of this argument that Commissioner Boisvert was properly sitting as a Judge Pro Tempore, without conceding this to be true, Commissioner Boisvert acted completely without jurisdiction and in excess of his jurisdiction in finding appellant in contempt of Court.

The Reporter's Transcript, which was a part of the record in the Court below, shows clearly that Commissioner Boisvert did not give appellant any opportunity to defend himself, or to make any statement save and excepting a requirement from the Commissioner that appellant make a self-incriminating statement as to whether or not he had on his person or was using recording equipment.

No Judge has a right to deny a litigant or an accused the right to a defense; this right of defense is so basic and vested that it is not subject to doubt. However, the Reporter's Transcript clearly shows that Commissioner Boisvert acted completely without jurisdiction in that he denied appellant the right to defend himself as to a possible charge of contempt of Court.

This, in and of itself, without regard to any other argument, is sufficient to prove that Commissioner Boisvert was acting without jurisdiction.

As a matter of fact, the situation described herein is exactly that set forth in *Exparte Virginia,* 100 U.S. 339, 25 Law Ed. 676, where the Court stated that the presence of malice and the intention to deprive a person of his Civil Rights is wholly incompatible with the judicial function. WHEN A JUDGE ACTS INTENTIONALLY AND KNOWINGLY TO DEPRIVE A PERSON OF HIS CONSTITUTIONAL RIGHTS, HE EXERCISES NO DISCRETION OR INDIVIDUAL JUDGMENT; HE ACTS NO LONGER AS A JUDGE, BUT AS A MINISTER OF HIS OWN PREJUDICE.

As Justice Douglas said in dissenting opinion in *Pierson v. Ray,* 87 Supr. Ct., 1213:

> "This is not to say that a Judge who makes an honest mistake should be subjected to Civil Liability. It is necessary to exempt Judges from liability for the consequence of their honest mistakes. * * * .
>
> "That is far different from saying that a Judge shall be immune from the consequences of any of his judicial actions and that he shall not be liable for the knowing and intentional deprivation of a person's Civil Rights. What about the Judge who conspires with local law enforcement officers to 'railroad' a dissenter? What about the Judge who knowingly turns a trial into a 'kangaroo' Court? * * * ? Congress, I think concluded that the evils of allowing intentional, knowing deprivation of

> Civil Rights to go unredressed far outweighed the speculative inhibiting effects which might attempt an inquiry into a judicial deprivation of Civil Rights."

Throughout the entire proceedings, appellant has sought a ruling as to whether or not Commissioner Boisvert had jurisdiction as to the proceedings to be held on the day in question, one for contempt and one for a motion.

It is well settled under California Law, in *In Re Gould,* 195 Cal. App. 2d 172, and particularly in *In Re Wales,* (1957), 153 Cal. App. 2d 117, that a contempt proceeding is separate and distinct from the action in which it arises. The *Wales* case, is particularly appropriate and is cited at length below because it is squarely in point here:

> "Unquestionably the authority of a Judge Pro Tempore, regularly selected and appointed pursuant to Article VI, Section 5, of the California Constitution, as to the cause in which he is appointed continues until a final disposition. (Citing cases). However, a contempt proceeding is not a Civil Action, either in law, or in equity, but is a separate proceeding of a criminal nature. (Citing Cases) Notwithstanding the recognized practice to prosecute the contempt in the cause of proceeding out of which it arose, and not as a separate proceeding with a title of its own. (Citing cases)."

"Commissioner Clad, not having been selected and appointed as a Judge Pro Tempore to hear the particular contempt proceedings, (based upon the order to show cause dated May, 1957), was without authority to make the order of commitment, notwithstanding his previous selection and appointment as a Judge Pro Tempore, to hear other contempt proceedings."

The circumstances in *Wales,* are on all fours with our case here. Without conceding the validity of the appointment of Commissioner Boisvert to hear a motion to permit the filing of a cross-complaint, Commissioner Boisvert was not appointed to hear a matter of contempt. The appointment of Commissioner Boisvert as a Judge Pro Tempore to hear the Pre-Trial matter in Superior Court Action No. 704,162, is and was limited. Inasmuch as a contempt proceeding is a separate proceeding, criminal in nature and not a part of the Civil Atcion at bar, *although arising out of it,* Commissioner Boisvert had absolutely no discretion, jurisdiction or authority to hear the contempt matter. His actions therefore, were done in complete absence of jurisdiction.

Other cases which make this same holding are:

In Re DuBois, 120 Cal. App. 2d 890; *Baily v. Superior Court,* 142 Cal. App. 2d, 47, and *In Re Chapman,* 141 Cal. App. 2d 387.

As a corrolary to the foregoing, appellant also cites *Pousson, v. Superior Court,* 165 Cal. App. 2d, 750,

where the Court pointed out that "a Court of Law has no inherent power to arrest citizens or place them in jail." As has been pointed out heretofore, the regularity and propriety of Commissioner Boisvert's order that appellant be taken into custody immediately, particularly in view of the finding of the Court of Appeals, that there was no contempt, is raised and again urged as further example of his complete lack of jurisdiction in the proceedings complained of.

There is an interesting case, having quite a bit of relevence here, *Yates v. Village of Hoffman Estates,* 200 Fed. Supp. 757. This was a Civil Rights Action, wherein the complaint alleged that a Municipal Magistrate directed a Police Sergeant to arrest the appellant. It was held in that case that it is "not a judicial function for a Judge to permit intentional tort, even though tort occurs in Courthouse."

Commissioner Boisvert is not only an attorney charged with special knowledge of the law, but, a Commissioner often acting as a Judge Pro Tempore, charged with interpreting the law. He must have been possessed of knowledge that his acts were completely out of his jurisdiction. His order to the Bailiff therefore, to take appellant into custody was an act of inientional tort within the definitions of the *Yates case.*

Such an order is clearly the type of situation which is outlined in *ExParte Virginia,* 100 U.S. 339, where the Court held that the presence of malice and the in-

tion of a Court to deprive a person of his Civil Rights is wholly incapatible with the judicial function. The Court pointed out that when a Judge acts so intentionally and knowingly as to deprive a person of his Constitutional rights, he is not exercising discretion or individual judgment, which is the line of demarkation between a judicial act and a ministerial act; such person acts no longer as a judge, but as a 'minister' of his own prejudice.

The judgment of Judge Ferguson, beginning at line 1, page 4, states that appellant agrees that Judges enjoy judicial immunity for actions arising out of their judicial acts, within their jurisdiction and that the Civil Rights Act Creates no exception to this immunity. Judge Ferguson cites, *Sires v. Cole,* 320 Fed. 2d 877 on this point, and he went on to say at line 9, that appel lant agrees that an allegation of conspiracy will not abolish the doctrine of judicial immunity, citing *Agnew v. Moody,* 330 Fed. 2d 868.

In the case of *Pierson v. Ray,* 87 Sp. Ct., 1213, which was decided in April of this year, and after *Sires,* the immunity of the Judge from a suit for violaton of Civil Rights was upheld not on the basis of an outright and overriding immunity, but because there was no proof that Judge Spencer had played any role whatever in the matter other than to adjudicate the matter from the bench. The opinion went on to say at page 1217:

"Few doctrines were more solidly established at common law than the immunity of Judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley v. Fisher,* 13 Wall (80 U.S. 335, 20 Law. Ed. 646 (1871)."

At page 1218, the Court goes on to say:

"We do not believe that the principal of law was abolished by Section 1983, which makes liable 'any person' who under color of law deprives another person of his Civil Rights. The Legislative Record gives no clear indication that Congress meant to abolish wholesale all common-law immunities."

This is, in truth an amazing opinion. In the first place, the statement that the Judges had immunity from liabilty for damages for acts committed within their judicial jurisdiction rests on *Bradley v. Fisher, supra.* That case had nothing to do with a Civil Rights Action.

Further, as Justice Douglas points out in his magnificently reasoned and supported dissenting opinion, the Congressional Record does show that the Congress very definitely considered the fact that the passage of these Acts would put a Judge under threat of civil suit at all times. There are, in the minority opinion a number of quotations from speeches of members of Congress, made during the debate on the passage of this Act. Nevertheless, the Act was passed — As Justice Douglas notes on page 1222:

> "Yet despite the repeated fears of its opponents, and the explicit recognition that the Section would subject Judges to suit, the Section remained as it was proposed; it applied to 'any person'. THERE WAS NO EXCEPTION FOR MEMBERS OF THE JUDICIARY. * * * "

Again on the same page Justice Douglas notes that *Pierson v. Ray, supra,* is out of line with prior decisions, citing *Ex Parte Virginia,* 100 U.S. 339, 25 Law. Ed. 676. In that particular case, the holding of the Court was very clear and explicit; that the then Civil Rights Act applied to all three branches of the Government. No exception was made in that case as to Judges or to any other person.

Thus, because of the insistence of the Supreme Court on maintaining a common law immunity against the expressed wishes of the Legislature, we are faced with two very serious and far reaching conclusions: First, That a Judge is immune from any act because while the common law immunity from liability granted to Judges for any act arising out of an act committed within their jurisdiction is well established, the immunity has now been extended, against and outside the meaning of the statute and the intent of the Congress to violations of any Civil Rights.

Secondly, we have by this decision, if maintained, created a new race of supermen. We now have a group of men in this United States who are immune from any liability created by any tort committed by them.

Under *Pierson v. Ray, supra,* State Judges do not suffer the normal result of a tortious act. They are thus, despite the Constitutional provision to the contrary, not equal with other men—they are far superior to other men because they do not have to worry about Civil liability.

This is ridiculous, but, it is a natural extension of the reasoning afforded in *Pierson v. Ray, supra.*

But there is a large question raised in *Pierson v. Ray, supra,* and this question appears and has never been decided in other important decisions on Civil Rights. The question is simply this:

> "What is an act done within the 'judicial jurisdiction?"

Judge Ferguson stated (page 6, lines 16-18) with reference to Commissioner Boisvert, that all proceedings therefore before him, were judicial proceedings and the doctrine of immunity applies. There is no citation for this holding and with this holding, Judge Ferguson does, in effect, hold that a Judge Pro Tempore or not, has jurisdiction to deprive a person of Civil Rights or a Constitutional Right.

The question of whether a Judge has committed an act within his judicial jurisdiction so as to enable him to be sheltered behind a Court granted immunity, as against a statutory liability created by the Congress, must be clearly and finally defined.

In *Agnew v. Moody, supra,* 330 Fed. 2d, 868, decided by this Court in 1964, it was held that a allegation of conspiracy would not abolish the doctrine of judicial immunity.

Judge Ferguson relied upon the case of *Agnew v. Moody, supra,* for the proposition that even an allegation of conspiracy will not defeat judicial immunity. This case, in and of itself is very interesting and a strange one. It was decided in 1964. However, Section 1985, in one form or another had been on the books of the United States since 1961 and provides that 'any person' who conspires to deprive a person of a Constitutional Right is civilly liable.

There is absolutely nothing to be found in the statute which exempts Judges from the conspiracy provision of the Civil Rights Act. In fact, *Ex Parte Virginia, supra,* cited above, stands for the opposite proposition and found a Judge guilty of violating a Civil Rights, even though it was done in the course of a judicial proceeding, i.e. the selection of a jury.

There is to be found an inference in *Pierson v. Ray, supra,* that if the Judge Spencer involved had played any role in the arrest and conviction, prior to the time the defendants are brought before him, for adjudication, that he might not have had judicial immunity. This is not expressed, but, there is a very clear inference in the opinion to this effect.

In order that litigants might go before a Court in full freedom, knowing that while a Judge is a man and can only rule in the light of his own experience and knowledge, and that they have recourse to the Appellate Courts should they desire, that they would have a remedy in the event of any of their Constitutional Rights foreclosed to them, it must be decided what constitutes a 'judicial jurisdiction,' so as to afford a judge complete immunity.

In the instant case, the facts of conspiracy are alleged in the complaint and give credence to the charge of conspiracy.

The definition of "excess of jurisdiction" has been definitely made in California in *Abelleiro v. District Court of Appeal,* 17 Cal. 2d 280, (109 Pac. 2d, 942, 132 A.L.R. 715., Excess of jurisdiction, briefly, consists, among other things of improperly applying the law. In that opinion, there is nothing whatever to be said about an act, whereby a Judge deprives a litigant or an accused of any Constitutional Rights. The failure to include an illegal act in *Abelleiro,* must therefore be considered to mean that an act done without jurisdiction is not merely in excess of jurisdiction, but is an act done in the complete absence of jurisdiction.

CONCLUSION

There are two defendants—Judge Levit and Commissioner Boisvert. The Judge acted as a principal and the Commissioner as agent. The Tort duty is encompassed in the Civil Rights Act. The Judge's act or failure to act was in refusing to disqualify the Commissioner, whom it was apparent to defendant and known among local judiciary would act with malice for what the Commissioner deemed erroneously to be a past invasion of the Commissioner's right of privacy. The principal agent analysis dispenses with the Ninth Circuit Court's animadiersion to conspiracy in Civil Rights violation where is obviously abounds.

The Judge defendant invokes the outmoded doctrine of immunity of public officers which the Ninth Circuit unwillingly has diluted in several cases among them the *Mickey Cohen cases* and others, where the District Attorney went off base, as here the Commissioner, the principal defendant, steps out of his proper role and becomes the avenger. It is unfair to the nearly one hundred percent of American Judges who do not require the milquetoast assessment of their character which is the basis of the spineless doctrine of judicial immunity. The dissent in *Pierson v. Ray, supra,* exposes this fallacious doctrine. It would not be remiss for the Ninth Circuit to meet this problem now where the facts demand judicial redress.

The Court below relies on a case which is sui generis and merely is a panegyric to Judge Bledsoe, (*Anderson v. Bledsoe,* (1934) 139 Cal. App. 650. The Court there identified Bledsoe as a former United States District Court Judge, who "obliged" the litigants by accepting appointments as a Pro Tempore Judge." This is strictly ad hominem.

In granting the writ of Habeas corpus in this case, the Court stated this shoudn't even happen to Hagan. *Bradley v. Fisher, supra,* holds where there is no jurisdiction, there is no judicial immunity. There was no jurisdiction here. If ever there was jurisdiction ,it had elapsed. The Commissioners animus leaps from the printed page as shown by the transcript and the case of *In re Hagan,* 224 Cao. App. 2d, 590. No greater example of a star chamber proceding can be conjured. Commissioner Boisvert wanted this man arrested. He was so carried away he forget to rule that defendant should be put in irons..

Among the many cases holding that a Commissioner in like circumstances loses his jurisdiction are the following:

In Re Wales, (1957) 153 Cal. App. 2d 117.

Respectfully submitted,

JESSE A. HAMILTON,
Attorney for Appellant.

Appendix

APPENDIX "A"

CASES RELIED UPON

"Courts of law have no inherent power to arrest citizens or place them in jail. The Legislature makes this caes on that subject within Constitutional limits. The jurisdiction of Courts in matters of arrest is controlled by the Constitution in the first instance, and the next by statutory authorization. (*In Re Mulford,* 73 Cal. App. 2d 452)"

Pousson v. Superior Court, (1958) 165 Cal. App. 2d, 750, 754.

" * * * it is equally elementary that disobedience of a void order made in excess of the jurisdiction of the Court does not constitute a contempt. (citing cases)"

After quoting from *In Re Mulford, supra,* the Court states:

"We are unable to find that the order for petitioner's arrest conformed to any authorized statutory procedure."

Silvagni v. Superior Court, (1958) 157 Cal. App. 2d 287.

"In the absence of any showing that an actual contempt of Court was committed, the order of the Superior Court cannot stand."

In Re Hagan, (1964) 224 Cal. App. 2d, 590-594.

UNITED STATES COURT OF APPEAL FOR THE
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C E R T I F I C A T E

I certify that, inconnection with the preparation of the opening brief of Evert L. Hagan, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, said brief is in full compliance with these rules.

DATED: November 28, 1967.

JESSE A. HAMILTON,
Attorney.